89-944

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1989

State of Georgia, Petitioner

v.

Thomas D. Stewart and Barbara Stewart

ON WRIT OF CERTIORARI TO THE

COURT OF APPEALS OF GEORGIA

PETITION FOR WRIT OF CERTIORARI

Harry N. Gordon

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QUESTIONS PRESENTED

It is reasonable, under the Fourth Amendment to the Constitution of the United States, for the police to search a mini-warehouse upon the invitation of the lessee of that warehouse who shares no mutual use or access to those promises, but who has been engaged unwittingly to acquire and maintain said lease by other persons for the purpose of concealing evidence of a crime?

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OPINIONS BELOW

The opinion of the Court of Appeals of Georgia in The State [of Georgia] v. Stewart et al. is reported at ___ Ga. App. ___, 382 S.E. 2d 677 (Ga. App. 1989) and is printed in Appendix A, infra, beginning at page 36. The order of the Court of Appeals of Georgia denying the motion for rehearing is reported at ___ Ga. App. ___, 382 S.E. 2d 677 (Ga. App. 1989) and is printed in Appendix A, infra, beginning at page 45. The denial of the petition for writ of certiorari to the Court of Appeals of Georgia by the Supreme Court of Georgia is unreported and is printed in Appendix A, infra, beginning at page 46. The judgment of the Superior Court of Clarke County granting the motion to suppress evidence of Thomas D. Stewart and Barbara Stewart is printed in Appendix A, infra, beginning at page 20.

JURISDICTION

The judgment of the Court of Appeals of Georgia (Appendix A, infra, page 36) was entered on May 16, 1989. A timely motion for rehearing was denied on June 2, 1989. Appendix A, infra, page 46. The Supreme Court of Georgia denied the petition for certiorari by the State of Georgia on September 29, 1989. Appendix A, infra, page 47. The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S. C. Section 1257 (a) (As amended June 27, 1988, Pub. L. 100-352, Section 3, 102 Stat. 662.)

CONSTITUTIONAL PROVISION INVOLVED

This case is predicated on the Fourth Amendment to the Constitution of the United States which provides as follows:

> The right of the people to be secure in their persons, houses,

> papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Thomas D. Stewart and Barbara Stewart stand indicted by the Grand Jury of Clarke County, Georgia, for the arson of their business premises in Bogart, Georgia, on February 9, 1985. The Stewarts filed a motion to suppress evidence in the Superior Court of Clarke County, which motion was granted. The Court of Appeals of Georgia affirmed the order of the Superior Court of Clarke County suppressing the evidence in question. The Court of Appeals of Georgia Denied a motion for rehearing, and the Supreme Court of Georgia denied a petition for

certiorari filed by the State of Georgia to review the decision of the Court of Appeals of Georgia. The following are the facts, briefly stated, of the search and seizure here in question:

On February 1, 1985, a man named Garnett Root, through one of his employees, rented a mini-warehouse at the request of Thomas D. Stewart. Stewart directed Root to the location and size of warehouse that was required. Stewart paid rent to Root on a month-to-month basis in cash. On February 9, 1985, Stewart's business burned, and the police suspected arson due to evidence of accellerants found in the fire debris. Items of property said to have been destroyed in the fire were listed on proofs of loss filed for the purpose of collecting insurance. On April 11, 1986, Root

contacted an agent of the Georgia Bureau of Investigation who had had no involvement with the arson investigation but who knew that a fire had occurred. Root told the agent about Stewart's acquisition and use of the warehouse and noted that the rental of the warehouse was done shortly before Stewart's fire. Root expressed concern that items supposed to have been destroyed in the fire were concealed in the warehouse, and that he, Root, would be implicated in Stewart's criminal activity. The Clarke County police detective who had investigated the fire was alerted to Root's revelations, and Root reiterated to this officer his fear that he would be connected with whatever Stewart had done. Root showed the police a copy of the warehouse rental agreement with his name on it as lessee,

and in fulfillment of Root's desire to clear himself, the police opened the warehouse after cutting the padlock. Upon opening the warehouse door the police observed items of property which they recognized as having been claimed on the proofs of loss. It is conceded that Root had no key to the warehouse, had never been to it or used it, and received no consideration for providing it to Stewart.

The order of the Superior Court of Clarke County is based on an interpretation of the decisions of the Supreme Court of the United States in Schneckloth v. Bustamonte, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973) (Appendix A, infra, page 22), United States v. Matlock, 415 U.S. 164, 94 S. Ct. 988, 39 L. 2d. 2d 242 (1974) (Appendix A,

infra, page 24), Stoner v. California, 376 U.S. 483, 84 S. Ct. 889, 11 L. Ed. 2d 856 (1964) (Appendix A, infra, page 28), and California v. Ciraolo, 476 U.S. 207, 106 S. Ct. 1809, 90 L. Ed. 2d 210 (1986) (Appendix A, infra, page 28). The Court of Appeals of Georgia rested its decision solely on "U.S. Constitutional protections" and the holding of this Court in Matlock, supra. Appendix A, infra, page 39.

REASONS FOR GRANTING WRIT

In rendering its opinion in this case, the Court of Appeals of Georgia purports to answer a seemingly simple question: "[D]oes the person who is the lessee of premises under the terms of a lease have sufficient control of the premises so that he can consent to a search even though he did not retain a method of access?"

Appendix A, infra, page 38. Testing the efficacy of third party consensual searches in terms of mutual access and control of the premises in question has at least the appearance of following this Court's ruling in United States v. Matlock, 415 U.S. 164, 171 N. 7, 94 S. Ct. 988, 39 L. 2d. 2d 242 (1974). Petitioner respectfully submits, however, that in Matlock, supra, this Court resolved issues different from those here presented, and that the Court of Appeals of Georgia is in error in holding that such matters as access to and control of the searched premises are dispositive regarding the ability of Garnett Road to invite the search of the mini-warehouse.

Both the Second Circuit and Third Circuit Courts of Appeals have addressed

sets of facts closely resembling those of this petition and have concluded that mutual access and control of the searched premises does not govern the scope of a third party's consent to search where the third party's connection to the premises makes him the unwitting dupe of another's criminal scheme. See United States v. Diggs, 544 F. 2d 116 (3rd Cir. 1976), and United States v. Botsch, 364 F. 2d 542 (2nd Cir. 1966), cert. denied 386 U.S. 937 (1967). Since Diggs, supra, is founded on the rationale of Botsch, supra, the facts of the earlier case will be discussed first.

In Botsch, supra, the accused rented a shack from a landlord named Stein which Botsch used to receive and store the fruits of his scheme to swindle other businesses. Botsch went so far as to dupe

Stein into actually receiving stolen property and storing it in the shack. For that purpose Stein had a key to the shack and entered it periodically. When the authorities confronted Stein with his tenant's misdeeds, the landlord promptly invited a search of the shack. The Second Circuit Court of Appeals found that:

> Stein and Botsch did not occupy a mere land-lord tenant relationship; Stein, having been made an unwitting accomplice by Botsch, had a vital interest in cooperating with the Inspectors so that he could remove any taint of suspicion case upon him. Indeed, any individual under similar circumstances would have a right to promptly and voluntarily exculpate himself by establishing that his role in the alleged scheme was entirely innocent and passive.

Botsch, supra, at 547.

> Because Stein's activities--though innocent--were inextricably inter-

> twined with Botsch's alleged scheme and cast suspicion upon him, we believe his authorization of the inspection when viewed in its full context rendered the search reasonable. (Citations omitted). It would be a harsh doctrine, indeed, that would prevent an innocent pawn from removing the taint of suspicion which had been cast upon him by a defendant's cunning scheme. Stein's innocence stood or fell on the very merchandise which, only after inquiry and inspection, could exculpate him.

Id. at 548.

The Court of Appeals of Georgia in the instant case distinguishes Botsch on the grounds that the landlord in that case had a key. The Third Circuit Court of Appeals in Diggs, supra, relying on the quoted portions of Botsch, supra, found that "it was the custodian's innocent involvement in the crime and not his possession of a key which was the significant factor making the search reasonable." Diggs, supra, at 120. Of

even greater interest for present purposes is the extension of the Botsch analysis undertaken by the Third Circuit Court of Appeals in the Diggs opinion. In Diggs, the accused bank robbers left a locked metal box with relatives for safekeeping. Their suspicion being aroused by various matters, the relatives took the locked box to the FBI and insisted that it be opened. The Diggs court found that:

> We are in agreement with the rule applied by the Court of Appeals for the Second Circuit in the Botsch case, namely, that the right of the custodian of the defendant's property who has been unwittingly involved by the defendant in his crime to exculpate himself promptly and voluntarily by disclosing the property and explaining his connection with it to government agents, must prevail over any claim of the defendant to have the privacy of his property maintained against a warrantless search by such agents. We are satisfied that the rule is applicable to the present case. Indeed, its application in

this case is even clearer. For here it was the custodian, Mr. Bradley, who first informed the agents at New Bern of the crime and of his suspicions about the box in his possession and who insisted that they come to his home immediately the same evening, so that the box might be opened in their presence and truth learned so that he might be exculpated. In the Botsch case, the inspectors had come to Stein because of information as to Botsch's alleged crime which they had received from other sources, and it was only after they had arrived on the scene and had spoken to him that he became concerned that his property, the shanty, was being used for illegal purposes and unlocked it and asked the inspectors if they wished to enter and inspect the premises, which they did without a warrant. It is true, of course, that Stein had a key and unlocked the shanty for the inspectors. We do not think that this was of any significance with respect to the question with which we are concerned however, for the part which Botsch induced Stein unwittingly to play in the unlawful scheme required that he open the shanty to receive the fraudulently obtained merchandise, whereas the part which Christine Mahone and

> the defendant, Diggs, induced the Bradleys unwittingly to play required them merely to keep the box containing the stolen money safely for them, not to open it.

Diggs, supra, at 120-121. An equally cogent observation is that "the activity [of the police] in question does not appear to be the sort of premeditated police intrusion that the exclusionary rule is meant to deter." Diggs, supra, at 124 (Adams, J. concurring).

The Court of Appeals of Georgia has premised its entire holding in this case on concepts of mutual access and control which, in the opinion of that court, are mandated by this Court's ruling in United States v. Matlock, supra. The Third Circuit Court of Appeals found no conflict between its decision in that case and this Court's rule in Matlock:

> [A]s the Supreme Court said in United States v. Matlock, 415 U.S.

> 164, 171, 94 S.Ct. 988, 993, 39 L.Ed.2d 242 (1974), "authority which justifies the third-party consent does not rest upon the law of property," but rather upon the possession of "common authority over or other sufficient relationship to the premises or effects sought to be inspected." Just as in the ordinary case of an individual who shares with a defendant joint access to or control over property for most purposes, the defendant, Diggs, must be held to have assumed the risk that the Bradleys whom he had thus involved in criminal conduct as custodians of the box might, when they learned the facts which appeared to incriminate them, disclose its contents in order to exculpate themselves, as in fact they did.

Diggs, supra, at 122 (footnote omitted). Petitioner submits that the holding of the Court of Appeals of Georgia requiring that third party consent depend on mutual access and control of the searched premises is wholly in conflict with both Botsch and Diggs. If the opinion of the

Third Circuit Court of Appeals in Diggs is indeed consistent with this Court's decision in Matlock, supra, then the decision of the Court of Appeals of Georgia either disregards or misapplies this Court's ruling in Matlock. Since this Court's ruling in Matlock, on its facts, deals only with the matter of consent to search given by a third party resident of that defendant's dwelling, petitioner respectfully suggests that this Court now has an opportunity to make clear the ruling in Matlock as it applies to consents to searches given by third parties who do not have direct access to end control of the premises in question. Petitioner further submits that the rulings in Botsch and Diggs, supra, provide an appropriate application of the Fourth Amendment principles developed by

this Court and that applying the analysis of Botsch and Diggs this Court will find that the Court of Appeals of Georgia has generated flawed and erroneous precedent in its decision in this case.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

IN THE SUPERIOR COURT OF CLARKE COUNTY

STATE OF GEORGIA

STATE OF GEORGIA	)	CASE NO.:
V.	)	SU-86-CR-0477-8
TOM STEWART AND	)	MOTION TO SUPPRESS
BARBARA STEWART,	)	EVIDENCE
DEFENDANTS.	)	

ORDER

Defendants in the above-styled case move this Court for an order suppressing the production of or reference to materials seized and testimony deriving from the search of a mini-warehouse located at West Broad Street in Athens, Georgia.

FACTS

Defendants herein are charged by indictment with first degree arson. On April 17, 1986, law enforcement officials

from the Georgia Bureau of Investigation and the Clarke County Police Department searched the contents of a mini-warehouse located at West Broad Street, near the State Farmer's Market in Athens, Georgia. The search was conducted without a warrant and pursuant to the request and consent of a third-party, Mr. Garnett Root.

Although Root was the named tenant of the mini-warehouse, he engaged in this month-to-month rental agreement at the request of his friend, defendant Tom Stewart. Pursuant to his agreement with the defendant, Root did not pay the rent for the premises. Rather, the money was paid by defendant Tom Stewart to Root, who in turn paid the money over to the landlord in the lease. Once the warehouse number was obtained by Root and given to the defendant, the defendant promptly

padlocked the doors of the premises, retaining the key for himself. Consequently, Root never visited the warehouse, nor did he ever inquire as to its contents. Also, Root never received any compensation for this arrangement with the defendant, explaining that he did it as a favor for a friend.

On April 17, 1986, when the police officers arrived at the warehouse, accompanied by Root, Root explained to them the arrangement he had entered into with the defendant. Root thereupon voluntarily consented to the search of the warehouse. Since he did not possess a key to unlock the building, the officers themselves cut the padlocks and searched the premises.

CONCLUSIONS OF LAW

In the landmark case of Schneckloth

v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973), the majority observed that the protections of the Fourth Amendment "are of a wholly different order" than those rights concerned with the fair ascertainment of truth at trial, and cited as one illustration of this distinction the fact that under some circumstances a third party may give a consent to search which will be effective against the defendant. The concern of the motion sub judice, then, is to define those circumstances between the defendant and the third party which may or may not give rise to a valid search. However, the burden of proving that the search was lawful must be carried by the state. O.C.G.A. Section 17-5-30 (b).

The primary issue which has confronted the courts is determining whether the third party possessed "common authority" over the premises to consent to the search. In United States v. Matlock, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974), the police were admitted to the house in which the defendant lived by a third party, and with her consent thereupon searched the house, including a bedroom she said was jointly occupied by the defendant and herself, where the officers found money taken in a robbery. The Court in upholding the search noted that a warrantless search is not limited to proof of the defendant's consent, but that permission to search may be obtained from a "third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." Id. at 171. At

this point, the Court dropped an explanatory footnote:

> Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

Thus, the Matlock Court stressed two separate bases for the "common authority"

rule: (1) that the consenting party could permit the search "in his own right"; and (2) that the defendant had "assumed the risk" that a co-occupant or one with a sufficient relationship to the premises might permit a search.

I.

The question of whether the consenting party could permit the search "in his own right" necessarily intails a discussion of the proper legal status of the third party vis-a-vis the defendant. In the case sub judice, the consenting party, Garnett Root, was the sole party whose name was listed on the lease as the tenant of the premises searched. However, form needs to be distinguished from substance; for although Root was formally listed on the lease as the tenant, he exercised no control whatever over the

activities surrounding the actual use of the warehouse. Rather, his actions consisted solely of carrying out the instructions of the defendant - i.e., obtaining the warehouse and paying the rent once it had been received from the defendant. Therefore, this arrangement between Root and the defendant was sufficient to constitute an agency relationship under O.C.G.A. Section 10-6-1, whereby Root agreed to "rent the mini-warehouse for the defendant to use." See generally, Smith v. Merck, 206 Ga. 361 (1950).* Under principles of agency, Root

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*Although this Court is not prepared to state that an agency relationship was conclusively established as a matter of law, because such a determination is for the fact-finder, insofar as this motion turns upon the authority of the third party to permit the search "in his own right" such an inquiry in justified.

legally bound the principal, the defendant, to the terms of the lease agreement even though the latter was not disclosed as principal when Root signed the lease. In this way, the defendant would be ultimately liable for any delinquent rent payments which might occur. Furthermore, since the lease agreement entered into by Root on behalf of the defendant was less than one year, his authority did not have to be in writing pursuant to O.C.G.A. Section 10-6-2.

Root, as the agent for the defendant, is thereby precluded from consenting to a search of the premises "in his own right" if he did not receive such authority from the defendant. See Stoner v. California, 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856

(1964). Root derives whatever power he has from the authority bestowed upon him by the principal. Thus, it is critical to determine just how broad the principal's request was.

For instance, in United States v. Selberg, 630 F.2d 1292 (8th Cir. 1980), the neighbors' consent to enter and search the defendant's house trailer was deemed non-existent because these neighbors "were simply under instructions to watch Selberg's home" and they "had no key, no access and admittedly did not believe that they had permission to enter," though Selberg had left his front door open. On the other hand, in Dover v. State, 250 Ga. 209 (1982), the defendant's mother-in-law, who lived elsewhere but had been given the key to the residence, could admit the police to investigate the disappearance of

her daughter, as the "placing of the house key in the hands of one outside the household" authorizes "the holder of the key to enter the dwelling, in the absence of the householders, when circumstances reasonably indicate that such entry might be necessary in the interest of the householders, or of safeguarding the dwelling."

As these two cases illustrate, the surrendering of the key to the premises is crucial in determining the scope of authority granted by the principal to the agent. Like Selberg, the defendant in the case at bar was unwilling to relinquish control of the keys to the locks which he had installed. Thus, actual access to the premises was never authorized by the defendant. As a result, Root's authority did not extend beyond simply "renting a

warehouse for a friend to use," and he therefore had no authority to consent to a search of the premises "in his own right."

II.

Whether the defendant has "assumed the risk" that Root might permit the search requires a consideration of all the surrounding circumstances incident to the search. Of course, the touchstone principle of the Fourth Amendment is a defendant's "expectation of privacy," California v. Ciraolo, ___ U.S. ___, 106 S.Ct. 1809, 90 L.Ed. 2d 210 (1986), and under the "assumed risk" doctrine of Matlock, a protected expectation of privacy will be upheld despite a third party's consent where the defendant has taken "special steps" to protect the property from the scrutiny of others. United States v. Block, 590 F.2d 535 (4th

Cir. 1978); Holzhey v. United States, 233 F.2d 823 (5th Cir. 1955). Of course, the primary "special step" which the defendant could take to insure the highest expectation of privacy would be to lock or bind the premises or effects to be searched. Block, supra. In this way, surrender of the key to the locked effects is tantamount to "assuming the risk" that a search will be permitted by the possessor of the key. See United States v. Schuster, 684 F. 2d 744 (1983).

For example, in United States v. Gunter, 546 F.2d 861 (10th Cir. 1976), a third party, at the suggestion of the defendant and using the defendant's money, rented a mini-warehouse in order to conceal tires which the two had stolen. The defendant locked the mini-warehouse and generally retained control of the keys

except when the third party obtained them in order to transfer the stolen property in and out of the warehouse. In upholding the validity of the consent by the third party, the Gunter court placed special emphasis on two controlling facts which are absent in the case sub judice. First, in Gunter the keys to the premises were surrendered to the third party, unlike the facts at bar. Secondly, the third party, unlike Root, was at all times aware of and participated in the activities surrounding the use of the warehouse. Since the defendant in the case at bar took affirmative steps to ensure the privacy of the warehouse, such as padlocking the entrance and retaining the exclusive control of the key, he did not "assume the risk" that a third party would permit a search of the premises.

CONCLUSION

There is insufficient evidence offered by the state to support a finding that the third party, Garnett Root, acting as the defendant's agent, had the authority to consent to the search of the premises "in his own right." Also, there is insufficient evidence to support a finding that the defendant had "assumed the risk" that Root would permit the search of a building when the defendant retained sole possession of the key to the padlocks which he had himself installed.

In light of the authority cited above and the facts as presented, defendants' motion to suppress evidence obtained in the search of the mini-warehouse or testimony deriving therefrom is hereby GRANTED.

So ordered this 27th day of

August, 19 88.

James Barrow
James Barrow, Judge
Superior Court of Clarke County

Court of Appeals

of the State of Georgia

ATLANTA, June 2, 1989

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A89A0116. THE STATE v. THOMAS D. STEWART ET AL

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

June 2, 1989

Court of Appeals of the State of Georgia

CLERK'S OFFICE, ATLANTA

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written. Victoria McLauglin, Clerk.

(2) May 16, 1989

CARLEY, C.J.

McMURRAY, P.J., & BEASLEY, J.

In the Court of Appeals of Georgia

A89A0116. THE STATE v. STEWART et al.

(Bea-13)

BEASLEY, Judge.

The State appeals the grant of defendant's motion to suppress evidence seized in a search of rented warehouse space. Defendants Tom and Brenda Stewart were indicted for the February 9, 1985 arson of their business premises in Bogart. OCGA Section 16-7-60 (a) (3). In the spring of that year Tom, who was a friend of Garnett Root, approached him

about renting storage space in a mini-warehouse in Root's name. Root agreed to do so and sent an employee to the warehouse to apply for and pay rental on a space. Thereafter, Stewart gave Root the money to apply to the rental on the month-to-month lease. Stewart had the padlock and key to the space; Root had no means of ingress and never saw the inside or its contents.

In April 1986, having learned about the arson investigation, Root became suspicious that items from the fire might be stored in the space and concerned about his role as a renter. On the sixteenth he went to the G.B.I. with his theory. Root and agents of the G.B.I. went to the mini-warehouse where, after Agent Sosbee checked the rental agreement upon which Root's name appeared as lessee, Root's

consent to search the storage space was obtained and entrance was gained by cutting the padlock. Items reported as destroyed in the fire of the Stewart's business were found inside.

The Stewarts moved to suppress the seized evidence and the trial court agreed that the search was illegal because Root's consent was ineffective. The question is: does the person who is the lessee of premises under the terms of a lease have sufficient control of the premises so that he can consent to a search even though he did not retain a method of access?

Suppression was based upon the facts that Root had no control over the storage area and could not consent to the search "in his own right;" that the Stewarts had an expectation of privacy in the space; and that they hand not "assumed the risk"

that Root would consent, because Tom had retained sole possession of the key to the padlock he had installed. The State contends that Root did not lack authority to consent to the search and the Stewarts did not have an expectation of privacy in the storage space.

This appeal rests upon U.S. Constitutional protections. U.S. v. Matlock, 415 U.S. 164, 171 (94 SC 988, 39 LE2d 242) (1974), held: "[w]hen the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission for the search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." "Common

authority" as defined is a footnote "is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justified the third-party consent does not rest upon the law of property, . . . but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it might be reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that others have assumed the risk that one of their number might permit the common area to be searched." Id. at 171, fn. 7.

Root was named as lessee on the rental agreement. While this represents an interest in the leasehold, it does not establish either "mutual use of the property" or "joint access or control."

Root had never been to the warehouse space prior to the search, although he paid rent at the rental office, and he did not have a key to access the space. He would have had to obtain Stewart's permission, as well as the key, to enter the space. Thus his third-party consent lacked "common authority" and was not predicated on the requisite control of the are. As in State v. Oliver, 183 Ga. App. 92, 93 (357 SE2d 889) (1987), Root did not have mutual use of the property and the fact that the officers believed in good faith that he had authority to consent did not make their warrantless search and seizure lawful. Without exigent circumstances, they could not bypass the Constitutional safeguard of obtaining a warrant. Browning v. State, 176 Ga. App. 420 423 (1) (336 SE2d 41) (1985).

The cases on which the State relies in which searches were permitted involve universally one who has the key to the premises or other access due to parties' relationship or other right to ingress, egress, occupancy or control. See e.g. U.S. v. Matlock, supra; U.S. v. Botsch, 364 F2d 542 (2nd Cir., 1966); U.S. v. Curcio, F.Supp (E.D. Pa., 1988). Compare U.S. v. Wyler, 502 F.Supp 959 (S.D. N.Y., 1980), in which the federal court found the consent of a mortgagor of the premises was invalid as to lessees where the mortgagor had no automatic contractual right to re-enter. Chapman v. U.S., 365 U.S. 610 (81 SC 776, 5 LE2d 828) (1961), held that a landlord could not validly consent to the search of his rented house.

Insofar as the State might argue abandonment through non-payment of rent,

see Smith v. State, 186 Ga. App. 303, 308 (3) (367 SE2d 573) (1988), this did not obviate the need for a search warrant. On April 16 when the search took place, the rent for the month was overdue but that had occurred in the past since Root did not pay the rent until he was given the money by Tom. On the advice of the searching officers, Root obtained the money from the Stewarts within a few days. The lease agreement provided that the lessor could secure the area when the rent was 60 days overdue but could not enter until after 90 days had expired. The proof did not demand a finding of abandonment.

Because Root was without the necessary authority and control of the area searched, the Matlock test was not met and the suppression of the evidence

was not error.

Judgment affirmed. Carley C. J., and McMurray, P. J., concur.

Court of Appeals

of the State of Georgia

ATLANTA, June 2, 1989

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A89A0116. THE STATE v. THOMAS D. STEWART ET AL

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

June 2, 1989

Court of Appeals of the State of Georgia

CLERK'S OFFICE, ATLANTA

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written. Victoria McLauglin, Clerk.

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE

ATLANTA

DATE: SEPTEMBER 29, 1989

HARRY N. GORDON
DISTRICT ATTORNEY
325 E. WASHINGTON STREET
ROOM 500
ATHENS, GA 306010000

Case No. S89C0194

THE STATE V. THOMAS D. STEWART ET AL.

(COURT OF APPEALS CASE NUMBER: A89A0116)

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur, except Marshall, C.J., Weltner and Hunt, JJ., who dissent.

Very truly yours,

JOLINE B. WILLIAMS, Clerk

CERTIFICATE OF SERVICE

I, Harry N. Gordon, hereby certify that I have served three copies of the foregoing petition on Russell T. Quarterman, counsel for Thomas D. Stewart and Barbara Stewart by having said copies delivered to the offices of Russell T. Quarterman at 347 West Hancock Avenue, Athens, Georgia, by Stanley Jordan, Chief Investigator for the Western Judicial Circuit, this 12th day of December, 19 89.

Harry N. Gordon
District Attorney

No. 89-944 (2)

Supreme Court, U.S.
FILED
FEB 21 1990
JOSEPH SPANIOL, JR.
CLERK

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1989

STATE OF GEORGIA,
Petitioner,

V.

THOMAS D. STEWART
AND BARBARA STEWART,
Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Georgia

BRIEF FOR THE RESPONDENTS IN OPPOSITION

SCOTT AND QUARTERMAN
ATTORNEYS AT LAW

Russell T. Quarterman
Lead Counsel of Record

Bradley S. Wolff

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14 pp

QUESTION PRESENTED

Should this Court grant certiorari to consider the propriety of an order suppressing evidence obtained in a warrantless search of a rented, locked mini-warehouse which search was based upon the consent of a third-party who had never been to the property, who had no key or other access to the property, had no idea of what was inside the mini-warehouse and whose only connection to the property was that he had acted as a "straw man" for the real tenant of the property in dealings with the owner of the mini-warehouse?

TABLE OF AUTHORITIES

Chapman v. United States, 365 U. S. 610, 81 S.Ct. 776, 5 LE2d 828 (1961) 4

Katz v. United States, 389 U.S. 347, 357 (1967) 6

Thompson v. Louisiana, 469 U.S. 17, 105 S.Ct. 409, 83 L.Ed.2d 246 (1985) 6

United States v. Block, 590 F.2d 535 (4th Cir. 1978) 2

United States v. Botsch, 364 F.2d 542 (2nd Cir. 1966) 3–5, 7

United States v. Diggs, 544 F.2d 116 (3rd Cir. 1976) 3, 5–8

United States v. Gunter, 546 F.2d 861 (10th Cir. 1976) . . 2

United States v. Impink, 728 F.2d 1228 (9th Cir. 1984) . . 2

United States v. Matlock, 415 U. S. 164, 94 S.Ct. 988, 39 LE2d 242 (1974) 2–4, 6, 8

United States v. Selberg, 630 F.2d 1292 (8th Cir. 1980) . . 2

No. 89-944

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1989

STATE OF GEORGIA,
Petitioner,

V.

THOMAS D. STEWART
AND BARBARA STEWART,
Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Georgia

BRIEF FOR THE RESPONDENTS IN OPPOSITION

REASONS WHY THE WRIT SHOULD NOT BE GRANTED IN THIS CASE

Certiorari should not be granted in this case because the State of Georgia advances no argument to this Court upon which the decision of the Court of Appeals of Georgia should be reversed and the decision of the Court of Appeals of Georgia is in conformity with long-standing and appropriate authority.

Both the trial court and the Court of Appeals of Georgia based their opinions in this case upon the rationale and test set out in this Court's decision in *United States v. Matlock*, 415 U. S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974). Since its announcement, the *Matlock* test has been the established guide for determining the validity of third-party consent to search and has been applied throughout the country in the numerous cases involving the validity of third-party consent. *See*, e.g., *United States v. Impink*, 728 F.2d 1228 (9th Cir. 1984); *United States v. Selberg*, 630 F.2d 1292 (8th Cir. 1980); *United States v. Block*, 590 F.2d 535 (4th Cir. 1978); *United States v. Gunter*, 546 F.2d 861 (10th Cir. 1976).

The State of Georgia argues that because *Matlock* involved a third-party consenter who had access to the searched premises by reason of being a resident therein, this Court should grant certiorari to announce a different rule for third-party consent in cases where the third-party consenter has no direct access and control of the premises. In support of its argument

that the decision of the Court of Appeals of Georgia should be reversed, the State of Georgia relies entirely upon the decisions in *United States v. Botsch*, 364 F.2d 542 (2nd Cir. 1966) and *United States v. Diggs*, 544 F.2d 116 (3rd Cir. 1976). Because these cases are of little or no value as precedent, and because the test set out in the *Matlock* decision encompasses and correctly determines the issue presented in the present case, this case does not present a situation in which a state court has decided a federal question in a way which conflicts with either the binding decision of a federal court of appeals or applicable decisions of this Court and the Court should refuse to grant certiorari.

A. THE CASES RELIED UPON BY THE STATE OF GEORGIA HAVE LITTLE OR NO VALUE AS PRECEDENT AND SUPPLY NO GROUNDS FOR THE GRANT OF CERTIORARI IN THIS CASE.

U. S. v. Botsch, *supra*, 364 F.2d 542, was decided in 1966 and thus, to the extent that it may conflict with this Court's decision in *Matlock*, was impliedly overruled. For the most part, however, the decision in *Botsch* is entirely consistent with the

spirit of *Matlock*. *Botsch* involved a landlord, Stein, who was actively, though innocently, involved in the illegal activities of his tenant, Botsch. Botsch had supplied Stein with a key to the rented premises and authorized Stein to enter the premises for the purpose of receiving and storing stolen property. On these facts alone, the Second Circuit Court of Appeals could have found that Stein had sufficient access and control over the property to give effective consent to a search of the property and that decision would have been entirely consistent with this Court's later ruling in *Matlock*. Prior to the *Botsch* decision, in *Chapman v. United States*, 365 U. S. 610, 81 S.Ct. 776, 5 L.Ed.2d 828 (1961) this Court had already decided the question presented in this case when it held that a lessor who does not retain access has no authority to consent to a search of the leased property. In fact, it was the landlord's possession of a key to the premises and expressly authorized access to the property which the *Botsch* court used to distinguish the case before it from the facts of *Chapman*. *U. S. v. Botsch*, *supra*, 364 F.2d at 547–548.

Since the *Botsch* opinion distinguishes itself from cases wherein a landlord has no right of access or use of the leased premises, this decision clearly does not apply to the facts of the instant case, wherein Root, the third-party consenter had never been to the property, had no key to the property, and no authority from the Stewarts to enter, use, or in any way access the property. Furthermore, the precedential value of *Botsch* has been severly eroded by the fact that some of the decisions upon which it was based have since been overruled. See *U. S. v. Diggs*, *supra*, 544 F.2d at 133, fn. 24 (Van Dusen, C. J., dissenting).

Likewise, the State's reliance upon *United States v. Diggs*, 544 F.2d 116 (3rd Cir. 1976) is entirely misplaced. Not only does *Diggs* not lend persuasive authority to the State's argument in the instant case, but that split decision is of no precedential value for the proposition put forth by the State in any case. The *Diggs* decision consisted of four judges voting to reverse the District Court's suppression of evidence, four judges voting to affirm, and two judges concurring, in separate opinions, with the

result that the lower court's order was vacated and the case remanded for further findings.

B. THERE IS NO NEED FOR AN "UNWITTING ACCOMPLICE" EXCEPTION TO EITHER THE 4TH AMENDMENT WARRANT REQUIREMENT OR THE THIRD-PARTY CONSENT EXCEPTION AS SET FORTH IN *U. S. V. MATLOCK.*

"In a long line of cases, this Court has stressed that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the fourth Amendment -- subject only to a few specifically established and well deliniated exceptions.' *Katz v. United States*, 389 U.S. 347, 357 (1967)." *Thompson v. Louisiana*, 469 U.S. 17, 105 S.Ct. 409, 83 L.Ed.2d 246 (1985).

The State relies upon *U. S. v. Diggs, supra*, in an attempt to justify a new exception to the Fourth Amendment based upon the theory that an "unwitting accomplice" somehow gains authority to consent to a search of property owned or controlled by another. While a portion of the *Diggs* court does purport to

create such an exception based upon dicta in *Botsch*, *supra*, it does so in the context of a custodian of the property, and does not address the issue of a person who has no present access or control over the property. *Id.* at 120–122. The State also puts forth the proposition that Garnett Root somehow became an "unwitting accomplice" in the alleged wrongdoings of the Stewarts by renting the warehouse in his name before the alleged crimes took place and offers no explanation as to how, under this state of facts, Root could be implicated in any of the Stewarts' crimes.

The theory that an "unwitting accomplice's" interest in exculpating himself from any taint of wrongdoing sufficiently overrides the privacy interests of the person controlling the property to obviate the need for a warrant is aptly refuted in Judge Van Dusen's dissent in *Diggs*, which states:

> Whatever interest Bradley had in purging himself of any possible taint ceased to operate once Bradley had notified the authorities of the existence of the locked box, explained the circumstances surrounding his possession of it, and

> physically turned the box over to Government agents....
>
> Because I cannot understand how a two-hour delay would denigrate Bradley's purported "right" to exculpate himself or how an immediate search would further Bradley's legitimate interests, I am unable to see how Bradley's exercise of the "right" to exculpate has any bearing on the need for a warrant or can furnish any excuse for circumventing the warrant requirement.

U. S. v. Diggs, 544 F.2d at 132, 133. Likewise, in the present case, whatever "right" Garnett Root had to exculpate himself from the possible taint of association with the Stewarts' activities was exercised by his notification of the authorities and his willing assistance to the authorities, such as his participation in obtaining, at the request of the authorities, rent from Mr. Stewart.

The proper test of whether an individual has the power to authorize a search of property owned, controlled, or used by another who is the target of the search remains the test set out in *U. S. v. Matlock, supra*. If the third-party consenter has sufficient interest in the property, he can give his consent to the search; if the third-party has sufficient information concerning

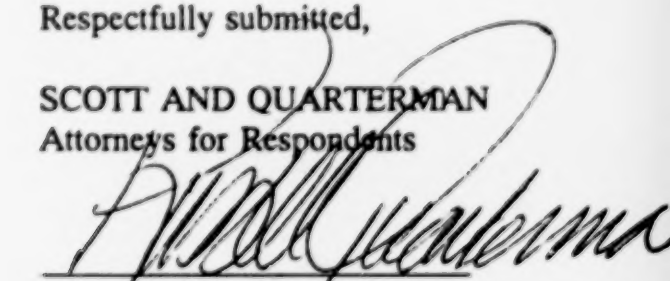
the activities of the target of the search to supply the police with probable cause, the police can get a warrant and conduct their search; but where, as in this case, the police have no probable cause to secure a warrant and conduct the search and the target of the search has taken sufficient measures to insure his privacy interest in the property, the Fourth Amendment demands that police not be allowed to invade protected privacy interests merely because some person tangentially connected with the activities of the target requests that property of the target be searched.

CONCLUSION

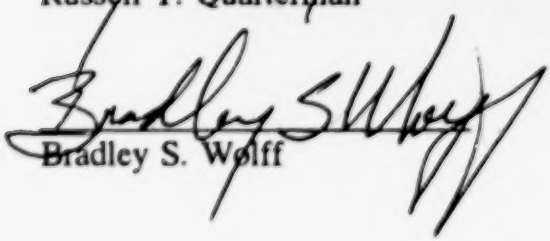
For all of the above stated reasons, Respondents respectfully submit that this case does not meet the criteria of great concern, gravity, and importance to the public necessary for the issuance of a writ of certiorari and the State's petition should, therefore, be denied.

Respectfully submitted,

SCOTT AND QUARTERMAN
Attorneys for Respondents



Russell T. Quarterman



Bradley S. Wolff

CERTIFICATE OF SERVICE

I hereby certify that I have this day served three copies of the foregoing Brief For The Respondents In Opposition upon opposing counsel by having said copies hand delivered to the Office of the District Attorney, 325 E. Washington St., Room 500, Athens, GA 30601 in the manner provided for by law and the rules of this court.

This 20 day of February, 1990.

Russell T. Quarterman
Attorney for Respondents